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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/695,728	10/30/2003	Cynthia A. Dionne	3028-1	5577

7590

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EXAMINER

PATEL, NIHIR B

ART UNIT

PAPER NUMBER

3743

DATE MAILED: 11/30/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/695,728

Applicant(s)

DIONNE, CYNTHIA A.

Examiner

Nihir Patel

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on October 30<sup>th</sup>, 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☐ Claim(s) \_\_\_\_\_ is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-7 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102/103*

Claim 1 is rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Messina US Patent No. 5,357,945. It would have been obvious to modify Messina's invention by designing the tube from an inert, non-toxic plastic material in order to prevent the patient from getting ill. Referring to claim 1, Messina discloses a multi-positional nebulizer device that comprises an elongated tube 30 having a facemask connector collar 41 and a nebulizer connector collar 31 at the opposed end thereof, the elongated tube formed from an inert, non-toxic (it would be inherent that the tube in Messina be formed of non-toxic plastic) plastic material and provided with a bellow type configuration along the length between the facemask connector collar and the nebulizer collar (see figure 6), the bellow type tube being flexible and resilient (see column 2 lines 59-65), the facemask connector collar 41 being sized to engage a facemask 51 and the nebulizer connector collar 31 being sized to engage the nebulizer tube fitting (see figure 6), whereby the nebulizer connector tube permits the patient receiving a nebulizer treatment to assume any desired position to the nebulizer allows the nebulizer to retain an upright position (see figure 6).

Referring to claim 2, Messina discloses an apparatus wherein the facemask connector collar 41 includes a circular channel formed therein and sized to allow the seatment therein of the facemask tube fitting connector flange, whereby the nebulizer tube will swivel relative to the facemask tube fitting to allow patient movement during nebulizer treatment (see figure 6).

Referring to claim 3, Messina discloses an apparatus wherein the nebulizer tube is formed from a material which is further provided with at least a partial memory thereby to retain any position to which the tube is manipulated (see column 2 lines 59-67).

Referring to claim 4, Messina discloses an apparatus wherein the facemask connector collar 41 is diametrically sized to fit and engage a standard facemask tube fitting 55 and the nebulizer connector collar 31 is sized to fit and engage a standard nebulizer tube fitting (see figure 6).

Referring to claim 5, Messina discloses an apparatus wherein the nebulizer tube 30 is sufficiently flexible and capable of swivel movement thereby to permit relative movement of the patient relative to the nebulizer device during nebulizer treatment such that the nebulizer maintains an upright position during the nebulizer treatment regardless of the patient's position (see column 2 lines 59-67).

Referring to claim 6, Messina discloses a multi-positional nebulizer device that comprises an elongated tube 30 having a facemask connector collar 41 at one end and a nebulizer connector collar 31 at the opposing end thereof (see figure 6), the elongated tube 30 formed from an inert, non-toxic plastic material (it would be inherent that the tube be formed from a non-toxic plastic material) and provided with a bellows type of configuration along the length thereof between the facemask connector collar 41 and the nebulizer connector collar 31 (see figure 6), the nebulizer tube further being formed from a material which is provided with a partial memory thereby to retain any position to which the tube is manipulated (see column 2 lines 59-67), the facemask connector collar 41 including a circular channel formed therein and sized to allow the seating therein of the facemask tube fitting connector flange whereby the nebulizer connector tube 30

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will swivel relative to the facemask fitting to allow for patient movement during nebulizer treatment (see figure 6).

Referring to claim 7, Messina discloses a multi-positional nebulizer device that comprises an elongated tube 30 having a facemask connector collar 41 at one end and a nebulizer connector collar 31 at the opposing end thereof (see figure 6); the elongated tube 30 formed from an inert, non-toxic plastic material (it would be inherent that the tube 30 be formed from an inert, non-toxic plastic material) provided with a bellow type configuration along the length between the facemask connector collar 41 and the nebulizer connector collar 31 (see figure 6 and column 2 lines 59-67), the bellows type configuration being flexible and resilient (see figure 6), the facemask connector collar 41 further including a circular channel formed therein and sized to allow the seatment therein of the facemask tube fitting connector flange therein such that the nebulizer tube will swivel relative to the facemask tube fitting, the facemask connector 41 being sized to engage the facemask tube fitting and the nebulizer connector collar being sized to engage the nebulizer tube fitting (see figure 6), whereby the nebulizer connector tube 30 permits the patient receiving nebulizer treatment to assume any desired position while the connection to the nebulizer allows the nebulizer to retain an upright position regardless of the patients position relative thereto (see figure 6 and column 2 lines 59-67).

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***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communication from the examiner should be directed to Nihir Patel whose telephone number is (571) 272-4803. The examiner can normally be reached on Monday-Friday from 7:30 am to 4:30 pm. If attempts to reach the examiner by telephone are unsuccessful the examiner supervisor Henry Bennett can be reached at (571) 272 4791.

NP

November 18<sup>th</sup>, 2004

Henry Bennett  
Supervisory Patent Examiner  
Group 3700

